88-1636
No. _____

Supreme Court, U.S.
FILED
APR 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

STATE OF IOWA AND
IOWA DEPARTMENT OF NATURAL RESOURCES,

Cross-Petitioners,

JOHN R. WILSON; CHARLES E. LAKIN, FLORENCE LAKIN; R.G.P., INC., AN IOWA CORPORATION; HAROLD JACKSON; and OTIS PETERSON,

(Cross-Petitioners on Separate Petitions)

v.

UNITED STATES OF AMERICA and
THE OMAHA INDIAN TRIBE,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THOMAS J. MILLER
Attorney General of Iowa

ELIZABETH M. OSENBAUGH*
Deputy Attorney General

JOHN P. SARCONE
Assistant Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
Tel. (515) 281-5351

Attorneys for State of Iowa and Iowa Department of Natural Resources

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether Title 25, U.S. Code § 194, if applied in this case to disadvantage the State, would create an unreasonable presumption that the Missouri River moved by avulsion based on the status of the plaintiff as an Indian and thereby violate rights of the State protected by the Due Process Clause, the Just Compensation Clause, and the Equal Footing Doctrine.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the courts below are: The United States of America and the Omaha Indian Tribe, who were the plaintiffs, and the State of Iowa and the Iowa Department of Natural Resources, successor agency to the State Conservation Commission of the State of Iowa, who are the Cross-Petitioners herein. Filing a separate cross-petition are defendants John R. Wilson (the personal representative of Roy Tibbals Wilson, now deceased), Charles E. Lakin, Florence Lakin, Harold Jackson, RGP, Inc., and Otis Peterson. Other defendants in the proceedings below are Darrell L. Sorenson, Harold Sorenson, Harold M. Sorenson, Luea Sorenson, and Travelers Insurance Company.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceedings ii

Opinions Below 2

Jurisdiction 3

Constitutional and Statutory Provisions Involved ... 3

Statement of the Case 4

Reasons for Granting the Writ 11

Conclusion 16

TABLE OF AUTHORITIES

Page

CASES

Block v. North Dakota, 461 U.S. 273 (1983) 14

City of Richmond v. Croson, ___ U.S. ___, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) 12

In Re: Omaha Indian Tribe, No. 86-1717 (8th Cir. July 18, 1986) 3

Loving v. Virginia, 388 U.S. 1 (1967) 12

Morton v. Mancari, 417 U.S. 535 (1974) 11, 12, 16

Mullins Coal Co. v. Director, Office of Workers Compensation Programs, 484 U.S. 135 (1987) 13

Nebraska v. Iowa, 143 U.S. 359 (1892) 13

New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836) 13

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 14

Omaha Indian Tribe v. Jackson, 854 F.2d 1089 (8th Cir. 1988) 3, 7, 16

Omaha Indian Tribe v. Wilson, 575 F.2d 620 (8th Cir. 1978) 2, 16

Omaha Indian Tribe v. Wilson, 614 F.2d 1153 (8th Cir. 1980), *cert. denied* 449 U.S. 825 (1980) . 2, 6, 7, 15

United States v. Wilson, 433 F.Supp. 57 (N.D. Iowa 1977) 2

United States v. Wilson, 433 F.Supp. 67 (N.D. Iowa 1977) 2, 5

United States v. Wilson, 523 F.Supp. 874 (N.D. Iowa 1981) 2, 7

United States v. Wilson, 707 F.2d 304 (8th Cir. 1982), *cert. denied* 465 U.S. 1025 (1984) 2, 6, 7, 14

TABLE OF AUTHORITIES–Continued

Page

United States v. Wilson, 578 F.Supp. 1191 (N.D. Iowa 1984) 3, 7, 8

University of California Regents v. Bakke, 438 U.S. 265 (1978) 12

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 13

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) 2, 5, 6, 9, 12, 13, 14, 15, 16

STATUTES AND RULES

Act of May 6, 1822, 3 Stat. 683 12

Act of June 30, 1834, C.161, § 22, 4 Stat. 733 ..... 3, 12

25 U.S.C. § 177 12

25 U.S.C. § 194 ..... *passim*

28 U.S.C. § 1254(1) 3

Rule 19.5 of the Rules of the Supreme Court of the United States 3

OTHER AUTHORITIES

United States Constitution, Amendment V 4

No. _____

In The

Supreme Court of the United States

October Term, 1988

STATE OF IOWA AND
IOWA DEPARTMENT OF NATURAL RESOURCES,

Cross-Petitioners,

JOHN R. WILSON; CHARLES E. LAKIN, FLORENCE LAKIN; R.G.P., INC., AN IOWA CORPORATION; HAROLD JACKSON; and OTIS PETERSON,

(Cross-Petitioners on Separate Petitions)

v.

UNITED STATES OF AMERICA and
THE OMAHA INDIAN TRIBE,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The State of Iowa and the Iowa Department of Natural Resources, successor to the Iowa Conservation Commission, who are respondents as to the Petition of the Omaha Indian Tribe in No. 88-1426, cross-petition for a writ of certiorari to review the judgment of the United

States Court of Appeals for the Eighth Circuit in this case if this Court grants the Tribe's petition.

OPINIONS BELOW

There are nine reported opinions in this litigation, an unreported order of the Court of Appeals, and the District Court's unreported Final Judgment and Decree dated May 29, 1987 (Pet. App. p. 16a), which was amended by Order dated June 30, 1987 (Pet. App. p. 31a).

The opinions and orders, in chronological order, are as follows: *United States v. Wilson*, 433 F.Supp. 57 (N.D. Iowa 1977) [*Blackbird Bend I*[1]] (Pet. App. p. 189a); *United States v. Wilson*, 433 F.Supp. 67 (N.D. Iowa 1977) [*Blackbird Bend I*] (Pet. App. p. 205a); *Omaha Indian Tribe v. Wilson*, 575 F.2d 620 (8th Cir. 1978) [*Omaha I*] (Pet. App. p. 135a); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979) (Pet. App. p. 107a); *Omaha Indian Tribe v. Wilson*, 614 F.2d 1153 (8th Cir. 1980), *cert. denied* 449 U.S. 825 (1980) [*Omaha II*] (Add. p. A-1); *United States v. Wilson*, 523 F.Supp. 874 (N.D. Iowa 1981) [*Blackbird Bend II*] (Pet. App. p. 52a); *United States v. Wilson*, 707 F.2d 304 (8th Cir. 1982), *cert.*

---

[1] For convenient reference, the Court of Appeals and the parties have referred to the four decisions of the Court of Appeals as *Omaha I, II, III,* and *IV*. The three decisions of the trial court have been referred to as *Blackbird Bend I, II,* and *III*. *Blackbird Bend I* includes the memorandum opinion of the District Court reported at 433 F.Supp. 57, and its findings of fact and conclusions of law reported at 433 F.Supp. 67.

denied 465 U.S. 1025 (1984) [*Omaha III*] (Pet. App. p. 92a); *United States v. Wilson*, 578 F.Supp. 1191 (N.D. Iowa 1984) [*Blackbird Bend III*] (Pet. App. p. 5a); *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (8th Cir. 1988) [*Omaha IV*] (Pet. App. p. 37a); *In Re: Omaha Indian Tribe*, No. 86-1717 (8th Cir. July 18, 1986) (Pet. App. p. 461a); Final Judgment and Decree entered May 29, 1987 (Pet. App. p. 16a); Order entered June 30, 1987 (Pet. App. p. 31a).

JURISDICTION

On February 28, 1989, the Omaha Indian Tribe filed a timely Petition for Writ of Certiorari in No. 88-1426 asking for review of the judgment of the Court of Appeals entered on August 12, 1988. The Tribe invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1). The Cross-Petitioners received the Petition on March 3, 1989. This Cross-Petition is filed pursuant to Rule 19.5 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code, Title 25 Section 194. *Trial of right of property; burden of proof.*

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R.S. § 2126.

Act of June 30, 1834, C.161, § 22, 4 Stat. 733.

United States Constitution, Amendment V.

No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This case involves title to land on the Iowa side of the Missouri River in Blackbird Bend. The Omaha Indian Tribe claims the land was cut away from its Nebraska reservation by a series of avulsions occurring after 1867 and before 1923. According to the Tribe's own complaint in 1975, the land had been occupied by the State and by Iowa landowners for approximately forty years. (Pet. App. p. 210a).

The Omaha Indian Tribe ceded all lands east of the Missouri River by Treaty in 1854. The Omaha Indian reservation is located on the west bank of the Missouri River in Nebraska.

In 1975 the Omaha Indian Tribe and the United States brought separate suits claiming Iowa land allegedly cut off from the Omaha Indian reservation by a series of avulsions after 1867 and before 1923. (Pet. App. pp. 263a, 269a).

While the United States claimed only the "trust lands" which were in the reservation in the 1867 Barrett Survey, the Tribe claimed an additional 3490 acres which allegedly accreted to the reservation prior to the river's "jumps" west. The Tribe's theory was that the river always moved away from the reservation by accretion,

thus adding land, and always moved back by avulsions, leaving the area in tribal ownership.

In 1976 claims to the lands in Blackbird Bend within the original reservation (the Barrett Survey area) were ordered to be first tried. (Pet. App. pp. 208a, 405a). The second part of the litigation involves the Tribe's additional land claims in this and other bends of the river. (Pet. p. 17, n.53) (Pet. App. pp. 48a, n.6, 208a). Some parties claiming land in the area outside the Barrett Survey were not parties to the portion tried below. (Pet. App. p. 48a, n.6). The Tribe did not appeal the April 1976 severance order, and the second portion of the suit has not yet been tried. However, the Tribe now insists that title should be quieted in it to all of the land within the entire bend.

The Barrett Survey portion was tried in 1976, and the District Court found that the Tribe failed to prove the alleged avulsions and that the river instead always moved by accretion. That decision, referred to here as *Blackbird Bend I* (Pet. App. pp. 205a, 242a-243a), was the first of nine written opinions in this case. The District Court and the Court of Appeals have written four decisions, and this Court has written one, *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979) (Pet. App. p. 107a). Final judgment has now been entered in the first portion. (Pet. App. pp. 16a-36a).

The final judgment resolves ownership of three categories of land within the Barrett Survey as follows:

(1) **Trust lands** – The United States as trustee for the Tribe obtained title to 1900 acres of "trust lands" which had been in the possession of private defendants for

many years. This area was in the reservation in the 1867 Barrett Survey. In *Wilson v. Omaha Indian Tribe* (Pet. App. pp. 123a, 132a), this Court held that 25 U.S.C. § 194 imposed the burden of proof on the private defendants to establish ownership of the area which was in the reservation prior to the river movements. "Section 194 is triggered once the Tribe makes out a prima facie case of prior possession or title to the particular *area* under dispute." (Pet. App. p. 123a).

On remand, the Court of Appeals held that the private defendants failed to overcome the presumption of title created by 25 U.S.C. § 194. *Omaha II* (Add. p. A-17). The Court of Appeals concluded that section 194 precluded the defendants from relying on any inferences from weaknesses in the Tribe's evidence, such as the lack of proof of any identifiable land in place after the alleged avulsions. (Add. pp. A-6, A-13, A-17). Although recognizing that the Tribe's evidence "did not equally balance Defendants' proof . . . " (Add. p. A-17), the Court held that the Tribe prevailed because of 25 U.S.C. § 194. This Court denied the Defendants' petitions for a writ of certiorari on October 6, 1980.

(2) **State lands** – The State of Iowa prevailed as to the 672.93 acres claimed by it within the Barrett Survey. In *Wilson*, this Court held that section 194 could not be applied to the State of Iowa, which is not a "white person." (Pet. App. pp. 121a-122a, 132a). The Tribe was therefore required to prove its case against the State without benefit of section 194. *Omaha III* (Pet. App. pp. 96a-100a).

In the most recent decisions below, the District Court determined again, as it did after trial, that the Tribe had failed to meet its burden of proof that the river moved by avulsion and the State was entitled to the lands it claimed. *Blackbird Bend III* (Pet. App. pp. 11a-12a). The Court of Appeals affirmed. *Omaha IV* (Pet. App. pp. 41a-44a).

The Tribe's argument that *Omaha II* conclusively established its right to the State lands as accretions to the "trust lands" had been adopted by the District Court on remand from *Omaha II*. *Blackbird Bend II* (Pet. App. pp. 56a-57a, 83a-84a). The State appealed, and the Court of Appeals held that this decision misconstrued the mandate in *Omaha II* and erroneously "bootstrapped" the Tribe's victory under section 194 so as to apply it improperly against the State. *Omaha III* (Pet. App. pp. 99a-100a). The Court of Appeals pointed out that its decision in *Omaha II* held only that the private defendants failed to overcome the presumption of title created by section 194 and did not determine that the Tribe proved the alleged avulsions. (Pet. App. p. 101a). On remand from *Omaha III*, the District Court held that the Tribe had not met its burden of proof that the river moved by avulsion. *Blackbird Bend III* (Pet. App. pp. 11a-12a). It is that decision which resulted in the final judgment challenged by the Tribe.

(3) **Fee patent lands** – The United States had issued fee patents to individuals to certain lands within the Barrett Survey line prior to the river movements. (Pet. App. pp. 188a, n.70, 209a). Section 194 did not therefore apply to the fee patent lands. *Omaha III* (Pet. App. pp. 100a-103a). Thus, like the State lands, the Tribe was

required to prove the alleged avulsions on which its claim of title depended. (Pet. App. pp. 100a-103a). There are approximately 306 acres of fee patent lands to which title was quieted in private defendants. (Much of the State lands had also been conveyed out of trust by fee patent.)

The United States had excepted from its complaint all lands which had been conveyed by fee patent out of trust. The Tribe, in 1976 (Pet. App. p. 407a), and then not again until November 1985, alleged that the United States' refusal to claim the fee patent lands and any land outside the reservation boundary constituted "fraudulent representation." (Pet. App. p. 321a). The Tribe, however, filed its own suit and put on its own case. Trial is pending on its additional claims. The Tribe did not raise the fraud issue in the prior appeals or on remand until after Judge Bogue issued the decision on ownership in *Blackbird Bend III*. The courts below rejected the fraud claim as meritless and untimely. (Pet. App. pp. 40a, n.4, 363a-365a).

The Tribe and the United States, as trustee for the Tribe, have recovered 1900 acres of the 2900 acres within the Barrett Survey in Blackbird Bend. The plaintiffs prevailed only where 25 U.S.C. § 194 shifted the burden of proof to the private defendants to establish that the alleged avulsions from 1867 to 1923 did not occur. This presumption was so stringent that the private defendants could not rely on any inferences resulting from weaknesses in the plaintiffs' proof of avulsion – even such a major weakness as the lack of evidence of identifiable land left in place. (Add. pp. A-6, A-13, A-17).

The Tribe lost wherever it could not rely on section 194 and it was required to prove the alleged avulsions.

Final judgment was rendered in the first portion of this suit on May 29, 1987. (Pet. App. p. 16a). The Court of Appeals affirmed the portions establishing ownership within the Barrett Survey. The Court of Appeals reversed on the United States' cross-appeal involving use of the court registry fund to pay for improvements. (Pet. App. pp. 44a-45a). That issue does not involve the State. (Pet. App. p. 45a).

The Omaha Indian Tribe filed a Petition for Writ of Certiorari seeking review of that judgment. The State of Iowa received the Petition on March 3, 1989.

SUMMARY OF ARGUMENT

This Court should deny the Tribe's Petition for a Writ of Certiorari which asks this Court to review rulings below which correctly decided issues of fact. The decision that the Tribe failed to meet its burden of proof to establish that the Missouri River jumped west by avulsions is not clearly erroneous, and no need exists for this Court to review the issues in this case.

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979), held that 25 U.S.C. § 194 does not shift the burden of persuasion to the State, because it is not a "white person." The Tribe's petition asks this Court to effectively overrule that decision and permit the Tribe to prevail against the State without proof of the alleged avulsions. Should this Court grant the writ requested by the Tribe, the State should be permitted to present its argument that 25 U.S.C. § 194 cannot constitutionally affect the Tribe's case against the State.

Section 194 was used against private defendants in this case to establish a presumption that the Missouri River moved by avulsion. Yet case law recognizes that avulsion is a very uncommon case. The basis for this presumption is the fact that the area in question was once in the possession or ownership of an Indian. There is clearly no rational connection between a party's status as an Indian and the conclusion that the river moved by avulsion.

Section 194 was first adopted in 1822 as an amendment to the acts regarding trade with Indians. The section makes sense only when viewed in the context of laws prohibiting the sale or transfer of Indian lands except with appropriate federal approval. Congress could perhaps rationally impose on non-Indians the burden of proving the requisite federal approval rather than require the Indian to prove the negative that approval had never been given. However, the issue here is how a river moved, an issue which has nothing to do with one's status as an Indian. Because the presumption of title is not substantially related to the peculiar status of Indians, the only purposes section 194 serves here are to discriminate on the basis of race and to take property without compensation. This Congress cannot do.

The constitutionality of 25 U.S.C. § 194 as applied is a significant question of law, appropriately determined by this Court. The courts below recognized that the application of 25 U.S.C. § 194 is outcome-determinative in this case. The Tribe won 1900 acres from private defendants solely because of the shift in the burden of proof created by this statute. The Tribe could prevail against the State

only if it could bootstrap its victory using section 194 to avoid proving the avulsions on which its case depends.

If this Court considers the Tribe's arguments that its victory on the trust lands using section 194 has preclusive effect against the State, the State should be given the opportunity to argue that the result would be unconstitutional.

REASONS FOR GRANTING THE WRIT

I. THE APPLICATION OF 25 U.S.C. § 194 TO THE ISSUES IN THIS CASE CONSTITUTES INVIDIOUS RACIAL DISCRIMINATION, CREATES AN IRRATIONAL PRESUMPTION OF OWNERSHIP, TAKES PROPERTY WITHOUT JUST COMPENSATION, AND IS BEYOND THE POWER OF CONGRESS.

If the Tribe's arguments in its petition were adopted, the result would be that 25 U.S.C. § 194 would be used to determine those issues of fact common to both the State and its co-defendants – namely whether the riparian lands were cut off from the reservation by avulsion. This is contrary to the statute and to this Court's decision in *Wilson*, and it is also unconstitutional.

The presumption of ownership in any Indian once in possession of land is clearly discrimination on the basis of race. Unlike the statute upheld in *Morton v. Mancari*, 417 U.S. 535 (1974), 25 U.S.C. § 194 creates a racial classification which benefits all Indians and not merely those Indians enrolled in federally recognized tribes. The statute in *Morton* provided a preference in Bureau of Indian Affairs employment to enrolled tribal members. It was

specifically found not to create a racial classification. 417 U.S. at 553 (text and note 24). *Morton* is not authority that Indians may constitutionally be granted benefits on the basis of race. *University of California Regents v. Bakke*, 438 U.S. 265, 304, n.42 (1978).

Discrimination on the basis of race is inherently suspect and subject to strict judicial scrutiny. A racial classification may be upheld only if its purpose is constitutionally permissible, the classification is necessary to accomplish a compelling interest, and the means are narrowly tailored to accomplish that purpose. *City of Richmond v. Croson*, ___ U.S. ___, 109 S.Ct. 706, 102 L.Ed.2d 854, 881-82 (1989); *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

Section 194 was adopted as an amendment to acts regulating intercourse between Indian tribes and non-Indians. *Wilson* (Pet. App. p. 119a). Act of May 6, 1822, 3 Stat. 683; Act of June 30, 1834, 4 Stat. 729, § 22. The Nonintercourse Act, 25 U.S.C. § 177, requires federal approval for the sale or transfer of Indian lands. If 25 U.S.C. § 194 were limited to issues of compliance with the Nonintercourse Act, then proof of trust status at the time of conveyance might arguably create a rational presumption that a deed was void, a presumption which a defendant could rebut by proving the existence of a treaty or other federal approval. By extending the presumption of title to any and all real property issues, 25 U.S.C. § 194 is not rationally tied to fulfillment of Congress's obligation to Indians, as required by *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

Applying section 194 to create a presumption of avulsion from proof of possession of the land prior to river movements occurring 100 years and 60 years ago violates due process. There is no rational connection between possession prior to the river's movements and a party's status as an Indian, which are the facts proved, and the conclusion that the river moved by avulsion, the fact to be presumed. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976). *See also Mullins Coal Co. v. Director, Office of Workers Compensation Programs*, 484 U.S. 135, ___ n.32 (1987). The Missouri River does not discriminate against Indians. No one can rationally presume that a river always moved into reservation land by avulsion. Indeed, the law recognizes that accretion is the rule and avulsion is a very uncommon case. *Nebraska v. Iowa*, 143 U.S. 359, 365-366 (1892). The application of section 194 to create a presumption of avulsion is not rationally related to its ostensible purpose – to protect Indians from unfair advantage. *Wilson* (Pet. App. pp. 119a-120a).

Imposition of this burden of persuasion is especially onerous when added to other special benefits the Tribe has in litigation. This suit was brought long after the expiration of statutes of limitation. The presumption of ownership provides the greatest advantage where, as here, the Tribe waits to pursue a claim until all evidence is difficult to obtain. The financial support of the federal government also gives a tribal plaintiff great advantage.

A tribe is not subjected to the same possibility of loss and gain from river movements as are other riparian owners. Yet this mutuality of risk is the basis of the law of river boundaries. *Nebraska v. Iowa*, 143 U.S. at 360-361, quoting *New Orleans v. United States*, 35 U.S. (10 Pet.) 662,

717 (1836); *see Wilson* (Pet. App. p. 127a). There is no evidence in the record to establish that the movements of the Missouri River along the boundary of the Omaha reservation only resulted in a loss of land to the Tribe. But given the applicability of statutes of limitation and sovereign immunity to bar claims by those who lost land by eastward movements of the river, there is clearly great potential for this Tribe and others to add significant acreage to their reservations. Section 194 exacerbates this inequity by creating a presumption of avulsion (or accretion) whenever a tribe so desires.

Permitting the United States to obtain title to real property by virtue of an unreasonable presumption constitutes an unconstitutional taking of property. The shift in the burden of persuasion resulting from 25 U.S.C. § 194 has, wherever applied in this case, resulted in the United States obtaining title to the property – title which it would not otherwise have obtained. *See Omaha III* (Pet. App. p. 103a). This statute where applied in this case operates as a permanent taking of title to the land by the United States. Because the presumption of title is not substantially related to the peculiar status of Indians, the only purpose section 194 serves here is to take property without compensation. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Congress cannot deprive a State of its property without payment of compensation. *Block v. North Dakota*, 461 U.S. 273, 291 (1983). A court cannot therefore constitutionally apply 25 U.S.C. § 194 where to do so would constitute a taking of the State's property.

Because the presumption of title lacks a rational basis, its only purpose in this case can be to transfer

property to the United States and to discriminate on the basis of race. Such are constitutionally impermissible objectives.

Furthermore, here the Tribe seeks to use section 194 to conclusively determine issues of fact as to land claims outside the scope of the statute – claims against the State and claims to land which were admittedly conveyed out of trust. The Tribe also seeks to bootstrap its victory as to the trust lands using section 194 as conclusively proving its claim of ownership of the lands outside the Barrett Survey merely by proof of accretion to the Survey lands. Extension of the effect of the presumption to claims outside the scope of the statute clearly has no rational basis.

II. IF THIS COURT GRANTS THE TRIBE'S PETITION, THE STATE SHOULD BE PERMITTED TO ARGUE THAT FINDINGS BASED ON 25 U.S.C. § 194 CANNOT CONSTITUTIONALLY BE APPLIED TO THE STATE.

The State has not to date been adversely affected by operation of 25 U.S.C. § 194, as this Court held that section does not apply to the State of Iowa, *Wilson* (Pet. App. pp. 121a-122a, 132a), and the State prevailed below. However, several of the questions presented in the Tribe's Petition for a Writ of Certiorari seek to have this Court quiet title in the Tribe to all of the lands it claims in Blackbird Bend, including State lands within and without the Barrett Survey. (Pet. pp. 24-26). The Tribe asserts that its victory in *Omaha II* (Add. p. A-1), based on section 194, establishes that the river moved west by avulsion and entitles the Tribe to all of the lands it claims within Blackbird Bend.

In *Omaha I* (Pet. App. p. 151a), the Court of Appeals summarily dismissed constitutional objections to section 194, citing *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974), as indicating that Congress can grant special treatment to Indians because of their special legal status. That decision was vacated on appeal. *Wilson* (Pet. App. p. 107a). The decision below, *Omaha IV* (Pet. App. p. 47a), states that *Omaha I* establishes the law of the case on the constitutionality of section 194. That is incorrect. Further, the State, which has so far prevailed in this litigation, cannot be precluded from challenging the constitutionality of the statute.

CONCLUSION

Cross-Petitioners State of Iowa and Iowa Department of Natural Resources pray that this Court grant this Cross-Petition if it grants the Petition for a Writ of Certiorari.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

ELIZABETH M. OSENBAUGH
Deputy Attorney General

JOHN P. SARCONE
Assistant Attorney General

Attorneys for State of Iowa and Iowa Department of Natural Resources